

## CHAPTER 4 - THE ENDANGERED SPECIES ACT

This chapter provides an assessment of the PASPGP process in effectively meeting the requirements of the Endangered Species Act. This includes first a summary of the recommendations and actions already being implemented to insure compliance with the requirements of Section 7 of the Endangered Species Act. An overview provided by the USFWS is included. Since the time of the USFWS, many actions are already being implemented to address USFWS comments.

### **Discussion:**

On August 8, 1998, a joint interagency meeting was held to discuss Section 7 of the Endangered Species Act, for the purpose of developing improved coordination procedures that could be implemented within the context of the PASPGP process. Process refinements to the existing Pennsylvania Natural Diversity Inventory (PNDI) search program were discussed. These included revisions to agency coordination and reporting and tailoring the PNDI search radii to meet the needs of the USFWS. Additionally, due to USFWS concerns for impacts to certain species of Federal concern, particularly the bog turtle (*Clemmys muhlenbergii*), additional “secondary screening” criteria were discussed to red flag potential new sites. An interagency workgroup was formed to assess various secondary screening options; however, a process has not been finalized as of this date.

In preparation for this meeting, the Corps polled all delegated CCDs to determine how PNDI was being applied in the GP registration process. They were asked which GPs were subject to PNDI searches and what search radius was used. The Corps identified variations - both in the GPs to which PNDI was applied and in the search radius being used. Sixteen CCDs were performing the PNDI search either in accordance with the PADEP requirements or to a more stringent standard.

Continued coordination with the USFWS is needed in order to ensure that PASPGP coordination and project review procedures are in compliance with the requirements of Section 7. Refinement of the SOP is an appropriate mechanism to address the issues raised.

## **Recommendations:**

1. PNDI hits on Federally endangered species should be referred directly to the USFWS.
2. The USFWS also indicated that a secondary screening process was needed in instances where a 'hit' would not be identified under *any* scenario that applies to known sites, as new occurrences continue to be found in areas that meet the habitat needs of the particular species. USFWS indicated that this is particularly important for the bog turtle (*Clemmys muhlenbergii*) and the freshwater mussel, the northern riffleshell mussel (*Epioblasma torulosa rangiana*). The USFWS acknowledged that they would need to tailor a screening process to manageable proportions, given the manpower constraints of their office and the resource agencies. It is expected that an acceptable process will be incorporated into the PASPGP.
3. To assist regulatory agency field staff in identifying potential bog turtle habitat/sites, the USFWS and the PFBC have conducted several training courses that included identification and evaluation of endangered species habitat. It is recommended that these training courses continue and regulatory agencies, including Corps, PADEP, and CCD staff, be encouraged to attend.

The following comments are those of the USFWS and do not necessarily represent the views of the Corps and PADEP.

### **A USFWS Overview**

*During the development of the PASPGP, the USFWS assisted in the drafting of standard operating procedures (SOPs) for threatened and endangered species. Based on the adoption of these SOPs, and the inclusion of regulatory language within the SPGP itself, the Service concurred that approval of the SPGP by the Corps is not likely to adversely affect federally listed species. That concurrence, however, was predicated on the assumption that PADEP and the Corps would carefully and consistently implement the threatened and endangered species SOPs.*

*Based upon the recent listing of the bog turtle (*Clemmys muhlenbergii*) as a threatened species (effective November 4, 1997) under Federal Endangered Species Act, and the*

*identification of several deficiencies in the implementation of the SPGP, the USFWS is no longer able to concur that implementation of the SPGP is not likely to adversely affect federally listed species in Pennsylvania. Therefore, reinitiation of consultation between the USFWS, Corps, and DEP pursuant to Section 7 of the Endangered Species Act, is warranted.*

*To date, the following deficiencies in the endangered species screening, review and coordination processes have been identified by the USFWS, as well as some potential solutions to those deficiencies:*

- 1. Problem/Issue: The USFWS is not contacted when a PNDI search reveals a “hit” on a federally listed species. When personnel conduct a PNDI search using the Supplement 1 form, they are directed to contact one of three natural resource agencies if there is a “hit” on a species of special concern. It does not occur to them to contact the U.S. Fish and Wildlife Service because the USFWS is not listed as a contact agency on Supplement 1. During discussions about this issue with PADEP employees, some thought that after they (DEP) contacted a state agency about the hit, the state agency would contact the Service. This is not the case, and the SOPs specifically indicated that the Service will be contacted regarding hits on federal status species. It is not appropriate to place this burden on state agency personnel who have no federal jurisdiction or federal regulatory authority for or over federal status species.*

*Solution: 1) Include the US Fish and Wildlife Service as one of the contact agencies on the Supplement 1 form. 2) Ensure that the species’ “Federal status” is evident (e.g., appears on the computer screen) when a hit occurs. 3) Ensure that PNDI users understand that some species have both Federal and State status, and are therefore regulated by both Federal and State agencies under separate Federal and State laws and regulations with different sets of requirements. 4) Ensure that PNDI users understand that the Service must be contacted regarding all hits on Federal status species.*

- 2. Problem/Issue: Not all permits are being screened through PNDI. Based on discussions with DEP and Conservation District personnel, there is a great deal of inconsistency regarding the use of PNDI to screen permits*

(GPs). Some screen only those GPs containing a PNDI screening requirement, and some don't screen any GPs. The DEP will want to know who does not. There is also inconsistency regarding an appropriate screening radius. Some personnel screen within a 0.5 mile-radius of the project site, while others only screen the estimated project area or specific wetland impact area.

Solution: All permits/projects must be screened, using PNDI, by personnel trained in the appropriate use and interpretation of PNDI data. A consistent 0.5 mile-radius search area should be used to ensure that screening picks up known and potential habitats that could be affected by the project.

3. Problem/Issue: In many cases, PNDI is viewed as the definitive and only tool necessary to screen for and consider species of special concern. The service has encountered consultants and DEP personnel who rely solely on PNDI results as the definitive answer for determining species presence/absence within a project area. Service recommendations for species surveys have often been met with resistance and the response that "there was no PNDI hit, so why do we need to do a survey?" Like the NWI maps, PNDI is a preliminary screening tool, not a definitive answer regarding the presence or extent of a species and its habitat.

Solution: 1) DEP and Conservation District personnel need to be instructed on the limitations of PNDI, and the need to be open to and solicit expert advice from resource agency biologists familiar with threatened and endangered species. 2) The Service and Pennsylvania Fish and Boat Commission have and will continue to provide training to Corps, DEP and Conservation District personnel to help them recognize potential threatened and endangered species habitats. 3) For certain types of permits (yet to be determined) and/or in certain geographic areas, personnel reviewing permits/projects must rely upon more than PNDI to ensure that threatened and endangered species are adequately considered, such as additional screening lists provided by the Service. For example, even if a PNDI search did not reveal a "hit" for a project affecting French Creek in Venango county, the Service and Pennsylvania Fish and Boat Commission should be contacted due to the likelihood that one or more threatened or endangered mussels or fish would be affected.

4. Problem/Issue: Permits have been issued in wetlands/waterways known to contain Federally listed species. Some examples include the following: 1) a utility line crossed eastern massasauga habitat—The Pennsylvania Fish and Boat Commission was never contacted, and the Corps issued a permit for road crossings and sewer pipeline in an area known to contain bog turtles without consulting with USFWS. The “take” of federally listed species is a prohibited action under Section 9 of the Federal Endangered Species Act. Agencies or individuals issuing permits or conducting actions that are likely to adversely affect Federally listed species could be subject to prosecution under the ESA if they have not complied with the necessary consultation and/or permit requirements.

*Solution:* 1) Screen all projects/permits, including Water Obstruction and Encroachment Permits, General Permits, Dam Permits, etc.) using PNDI. 2) Further screen projects in particular geographic areas and habitats likely to support threatened and endangered species with the USFWS, in accordance with the SOP. 3) Notify the Service of any projects affecting known or potential threatened or endangered species habitat.